87-910

Supreme Court, U.S.
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No._____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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GEORGE BREWSTER, Petitioner

v,

MOUNT VERNON HOSPITAL, et al.,

Respondents

_____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

_____

GEORGE BREWSTER
3407 Wessynton Way
Alexandria, VA 22309
(703) 360-7092
Petitioner

QUESTIONS PRESENTED

1. Whether Section 1 of the Fourteenth Amendment of the United States Constitution is violated by Virginia Code Section 37.1 on civil commitment, particularly Sections 37.1-67.1 and 37.1-67.4 on involuntary detention and treatment, when applied to involuntarily detain, to put into solitary confinement, and to drug petitioner, where petitioner was given no detention hearing and where there was no claim of petitioner's being dangerous to another person?

2. Whether the right of trial by jury of the Seventh Amendment of the United States Constitution was denied to petitioner when, prior to trial of a civil rights action under 42 U.S.C. 1983, the courts below (a) dismissed respondent hospital and health care providers for want of state action, where petitioner repeatedly presented evidence of state

action and (b) dismissed respondent police officers for want of responsibility for damages (or for good faith immunity), where petitioner repeatedly presented evidence of their responsibility?

3. Whether respondent hospital and health care providers are state actors under 42 U.S.C. Section 1983, when they acted to involuntarily detain, to put into solitary confinement, and to drug petitioner, where such acts (a) were done under authority of a detention order (prima facie evidence of state action, as a detention order is an exclusive prerogative of the state and issued by the state under Virginia statute) and (b) were done jointly with state officials in a procedural scheme created by statute causing deprivation of petitioner's constitutional rights?

4. Whether respondent police officers are responsible for damages (or have good faith immunity) under 42 U.S.C. Section 1983, (a) where they should have known they violated petitioner's constitutional rights despite a magistrate's order, (b) where they took petitioner from his home and involuntarily detained him for over three hours under false pretenses, without charges, and without probable cause, (c) where they acted jointly with a nurse to cause a magistrate to issue a written detention order (which they should have known was invalid on its face), and with no detention hearing and no claim petitioner was dangerous to another person, involuntarily detained petitioner for three days, put him into solitary confinement and caused him to be forcibly drugged, and (d) where a police officer without probable cause signed a petition for such detention and treatment?

LIST OF PARTIES

The parties before the Court are petitioner, George Brewster and (a) respondents hospital and health care providers: Mount Vernon Hospital, Donald Burlington, Robert H. Robertson, Nooreddin Mirmirani, Ann Fortescue, Jill Inskeep, Bernadette Lester, Millie Wright, Sarah Fogelson, and Linda Anderson; and (b) respondents police officers: Robert W. Gideon and William A. Moore.

The parties before the Court also were parties to the proceedings below, with the name of Donald Burlington changed from Burlington Maguire.

The following persons also were parties in the proceedings below, but petitioner believes these persons no longer have an interest in the proceedings: John Doe No. 1, John Doe No. 2, David A. Hetzer, and Jose Aunon.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

George Brewster, Petitioner

v.

Mount Vernon Hospital, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, George Brewster, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit (Richmond) entered on March 19, 1987.

OPINION BELOW

The opinion of the Court of Appeals is reprinted and attached at Appendix E.

The Court of Appeals denied petitioner's petitiion for rehearing on

April 17, 1987. The order is reprinted and attached as Appendix F.

JURISDICTION

On March 19, 1987 the Court of Appeals entered judgment affirming the District Court's order granting respondents' motion for summary judgment and their motion to dismiss the action brought pursuant to 42 U.S.C. Section 1983. (App E) On April 17, 1987 the Court of Appeals denied petitioner's petition for rehearing. (App F) The Jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE

United States Constitution, Amendment VII:

> In Suits at common law ... the right of trial by jury shall be preserved.

United States Constitution, Amendment XIV:

> Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Code (1987 Supplement):

Section 37.1-1. ... "Mentally ill" means any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, he requires care and treatment ... .

Section 37.1-67.1. ... Any judge ... or a magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, may, upon the sworm petition of any responsible person or upon his own motion based upon probable cause, issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before the judge. If such person cannot be conveniently brought before the judge, the judge or magistrate may issue an order of temporary detention.

The officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place for a period not to exceed forty-eight hours prior to a hearing. ... (I)n no event may he be detained for a period longer than seventy-two hours... The chief judge of each general district court shall establish and require that a judge ... or a magistrate ... be available seven days a week, twenty-four hours a day, for the purpose of performing the duties established by this section. ...

> Section 37.1-67.4. ... Any such convenient institution caring for a person placed with it pursuant to a temporary order of detention is authorized to provide emergency medical and psychiatric services ... .

STATEMENT OF THE CASE

In 1985 petition brought this damage action pursuant to 42 U.S.C. Section 1983 under jurisdiction of 28 U.S.C. Section 1343. In the complaint petitioner stated that during the period from July 23 to 26, 1983 respondents acted to deprive him of his civil rights secured by the First, Fourth, Sixth, and Fourteenth Amendments.

On July 23, 1983 petitioner phoned a magistrate (Presumably named Gardner) (App 142)[1] to see if false misdemeanor charges placed against him six days earlier could be dropped before trial (in Fairfax County General District Court) to end damages as soon as possible. The

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1. Such references are to the page of the Appendix filed with the Court of Appeals.

magistrate suggested they talk face to face and that, because petitioner had a car problem, he (the magistrate) could send a police car to transport petitioner.

Police arrived at petitioner's home, found no distress, and took petitioner to a building where he was told he would see the magistrate. A woman (Fortescue) began interviewing petitioner and identified herself as a nurse at Mount Vernon Hospital. Petitioner became suspicious and tried to leave but was prevented by Officer Moore and by Nurse Fortescue, who told petitioner that if he answered their questions they might let him leave. Petitioner's requests to telephone an attorney were denied. Petitioner answered questions in an attempt to leave.

Fortescue asked petitioner why he called police and threatened to kill himself. (Petitioner later discovered Magistrate Gardner telephoned Magistrate

Hetzer, who called Nurse Fortescue and said petitioner wanted to end it: referring to the charges being discussed but apparently distorted by someone as a suicide threat.) (App 142-144) Petitioner explained to Nurse Fortescue he never threatened to kill himself and that, although he was upset by the false charges, he was not depressed. Petitioner further explained he was a psychologist with a Ph.D. degree, was a Christian Scientist, that he objected to medicine and drugs, and that he had allergic and paradoxical reactions to drugs. Petitioner was questioned at length about his religious and philosophical beliefs. Petitioner explained his Christian Science views that he did not believe in death, that the material world is an illusion, and consequently that Earth is not a material place but a state of being, or a state of mind. When questioned further, petitioner mentioned Buchminster Fuller's

concept of "Spaceship Earth", James Lovelock's "Gaia Hypothesis", and contempoary views of theoretical physics on black holes and white holes. Fortescue could not accept or understand petitioner's views, so petitioner explained to her that religious and philosophical beliefs which he shares with other cannot be called psychosis.[2] (Petitioner later discovered his harmless religious and philosophical beliefs, and the entire interview, were misunderstood and distorted making him sound crazy.) (App 54-58)

Despite petitioner's objections, Nurse Fortescue told him that because he refused drugs he needed to be in a

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2. "Beliefs or experiences of members of religious or other subcultural groups may be difficult to distinguish from delusions or hallucinations. When such experiences are shared and accepted by a subcultural group they should not be considered evidence of psychosis." Diagnostic and Statistical Manual of Mental Disorders, Washington, D.C.: American Psychiatric Association (3d Ed. 1980) p. 188.

hospital to make sure he took drugs. (App 58) Petitioner explained that because of his religious and philosophical beliefs, no one had any legal right to force drugs on him. Fortescue disagreed.

Petitioner was interviewed for over three hours and refused any further conversation with Nurse Fortescue when she tried to obtain a false confession from him concerning the false charges (which subsequently were dropped). Petitioner told her he had a legal problem, not a psychiatric one. (App 57)

Petitioner then was admitted by Dr. Burlington (who found no reason to detain petitioner other than citing a detention order). (App 91) Petitioner had no hearing but was told by Officer Moore, "We're going to detain you to see if you need psychiatric care." As petitioner was taken by police and hospital staff to the psychiatric ward, a staff member delivered

a piece of paper (presumably a detention order) to Officer Moore. (Petitioner later discovered the order was signed by Magistrate Hetzer and relied upon the advice of Nurse Fortescue as "a person skilled in diagnosis or treatment.") (App 14) (The order was later signed by Officer Moore as executed (App 15) and on a related form he was listed as petitioner (App 16).)

Despite petitioner's objections he was taken by Officer Moore and others to a locked psychiatric ward, and locked in solitary confinement because psychiatric counselor Inskeep said, "There's too much stimulation on the ward for him" (or because "agitation was noticeable" as she wrote in the hospital record.) (App 68)

Solitary confinement contained only a plastic mat to sleep on. There was no toilet or sink. Petitioner was told by hospital staff to "Lie down and get some

rest. You're going to be in there a long time." As petitioner was falling asleep, Dr. Robertson entered and, because petitioner was half asleep and before petitioner could say anything, Dr. Robertson said he would come back later, and left without interviewing petitioner. Although petitioner was locked in solitary confinement sleeping, he was awakened to have drugs forced on him despite his objections. (App 70) These mind-altering drugs were ordered by Dr. Robertson (App 87) without ever interviewing petitioner but apparently by interviewing Nurse Fortescue. (App 61) (Petitioner later discovered Dr. Robertson mistakenly diagnosed him as schizophrenic (App 61), which is impossible[3] according

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3. A diagnosis of schizophrenia requires "onset before age 45, and a duration of at least six months." Diagnostic and Statistical Manual of Mental Disorders, supra, p. 181. Such diagnosis is impossible because petitioner was 46 at the time and never was alleged to have symptoms of at least

to psychiatric standards.

Drugs prevented petitioner from eating, and caused paradoxical reactions and drug intoxification which, along with the negative effect of solitary confinement, staff misinterpreted as mental illness. (App 80, 81, 92) Drugs also caused "dystonic reaction" (App 78), and caused blood pressure to fall from "150" (App 91) to "74" (App 80). (Petitioner later discovered that his refusal to take drugs and his complaints about the damages they caused were misinterpreted as "paranoia". (App 65) Petitioner was given mind-altering drugs repeatedly for two days despite his objections and allergic reactions.

After two days petitioner briefly

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six months. Such diagnosis also conflicts with the written report of Dr. Harold Kaufman of Washington, D.C., a psychiatrist who has known petitioner since 1971 and who has failed to find petitioner mentally ill at any time. Dr. Kaufman's report was Pretrial Exhibit (P-8).

saw Dr. Cooper and an attorney, which presumably constituted a preliminary hearing. Officer Moore was present and signed a petition for commitment, saying he had already signed one two days earlier. (App 16) A few hours later petitioner was taken out of solitary confinement and forced to talk with Dr. Mirmirani or else being put back in solitary confinement and having additional drugs forced on him, ordered by Dr. Mirmirani before ever interviewing petitioner. (App 88, 65). The following day petitioner was released following a civil commitment hearing, because Officer Moore could produce no evidence that petitioner was dangerous.

In his complaint, petitioner specified permanent damages, which continue today. (App 12, 13) Attached to the complaint were the detention order and a form showing Officer Moore as petitioner. (App 14-16)

In Federal District Court respondent hospital and health care providers moved to dismiss for want of state action. Their motion was granted despite petitioner's objection that respondents' reliance on a detention order was prima facie evidence of state action. Petitioner's motion to reconsider the dismissals was denied.

Then respondent police officers moved to dismiss for want of responsibility (or for good faith immunity), which was granted despite petitioner's objection that respondents acted initially "without a warrant" (App 137), "were in conspiracy with the magistrate to get him there" (App 139), there was "no emergency at any time" (App 145), and "if they threw him in a mental ward, which they did, they would be responsible for what happened".(App 146).

The Fourth Circuit affirmed the dismissals, despite petitioner's repeated and additional arguments of state action

and responsibility. The Fourth Circuit denied petitioner's petition for rehearing, in which he emphasized the dismissals as conflicting with Supreme Court decisions.

REASONS FOR GRANTING THE WRIT

I

Virginia statute (a) authorized involuntary detention and treatment for up to three days prior to a hearing, with no detention hearing and with no claim petitioner was dangerous to another person and (b) conflicts with the Fourteenth Amendment and with decisions of this Court and other Circuits

A. Civil commitment violates the Fourteenth Amendment

Virginia statute deprives any person of his liberty on an allegation of being mentally ill. Mentally ill is so broadly defined that any person may be deprived of his liberty if alleged to require care and treatment "for his own welfare or the welfare of others." Virginia Code Section 37.1-1. Conceivably, according to statute, petitioner even could be deprived of his liberty for the welfare of physicians who

benefit financially from his confinement, as long as he is alleged to require care and treatment for their benefit.

Virginia statute is unconstitutionally broad,[4] using "mental illness" as legal fiction to justify commitment.[5]

As Former Chief Justice Burger wrote:

> Nor can I accept the theory that a State may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concepts of due process would not tolerate such a "trade-off." O'Connor v. Donaldson, 422 U.S. 563, 589 (1975).

A person subject to commitment proceedings is entitled to at least the same safeguards as criminals. Former

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4. Even a person "medically determined to be in need of ... counseling" because of alcohol or drug use may be deprived of his freedom, according to Virginia statute. Section 37.1-1.

5. Akin to using "personalty" as legal fiction to justify slavery under the Constitution prior to the Thirteenth Amendment. See "Mental illness as legal fiction" (Chap. 11), pp. 319-341, in Thomas Szasz, Insanity. New York: Wiley (1987).

Justice Fortas wrote:

> (C)ommitment is a deprivation of liberty ... whether it is called "criminal" or "civil". In Re Gault, 387 U.S. 1, 50 (1967). See Sprecht v. Patterson, 386 U.S. 605, 608 (1967); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

Even assuming Virginia statute means mentally ill and dangerous, an individual cannot be deprived of his freedom on an accusation of being dangerous without using the same standards applied to accused criminals, i.e., accused or convicted of a crime according to standards of criminal codes.

If the state wanted to arrest petitioner on a charge of wanting to "end it", then it had to do so through a criminal code, not an unconstitutional civil code.[6]

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6. For further discussion of the unconstitutional nature of civil commitment, see Thomas Szasz, Insanity, supra, n. 5; Lee Coleman, M.D., Reign of Error, particularly "Involuntary psychiatry and the rule of law" (Chap. 8), pp. 153-176, "Abolishing involuntary

B. Detention of a citizen without a detention hearing is facially invalid

Virginia Code Section 37.1-67.1 authorizes detention for up to three days prior to a hearing, without providing for a detention hearing and without providing for an attorney at a detention hearing, facially invalid under the Fourteenth Amendment. All person detained under Section 37.1-67.1 are detained because the person cannot conveniently be brought before a judge. This Section requires a judge or magistrate be available seven

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treatment" (Chap. 9), pp. 177-195, and "The crime of treatment" (Chap. 10), pp. 196-215, Boston: Beacon (1984); Bruce J. Ennis, "Statement", pp. 261-289, in Constitutional Rights of the Mentally Ill (1970): Hearings, United States Senate. Ninety-First Congress, Washington, D.C.: U.S. Government Printing Office; Thomas S. Szasz, M.D., Law, Liberty, and Psychiatry, particularly "Psychiatry and Constitutional Rights" (Part Four), including "The Abridgment of the constitutional rights of the mentally ill" (Chap. 15), pp. 182-190, New York: Macmillan (1963); Richard Arens, "Statement", pp. 207-217, in Constitutional Rights of the Mentally Ill (1961): Hearings, United States Senate, Eighty-seventh Congress, Washington, D.C.: U.S. Government Printing Office.

days a week, twenty-four hours a day, so it cannot be inconvenient to deny petitioner a detention hearing. An alleged inconvenience is no justification for denying petitioner Fourteenth Amendment protections.

Also, Section 37.1-67.1 denies petitioner equal protection of the Bail Reform Act, chiefly by not providing for a detention hearing or for counsel at a detention hearing, as provided under 18 U.S.C. Section 3142(f).

C. Detention of a citizen with no claim of being dangerous to another person conflicts with the Fourteenth Amendment and with decisions of this Court

Anyone alleged to be mentally ill may be detained under Section 37.1-67.1 for his own welfare, presumably claimed for petitioner, as there was no claim made by anyone that he was dangerous to another person or to the community.

According to Chief Justice Rehnquist, detention is warranted for "community

safety'. United States v. Salerno, No. 86-87, slip opinion, at ii (1987). "We have also held that the government may detain mentally unstable individuals who present a danger to the public." Id, at 9, referring to Addington v. Texas, 441 U.S. 418 (1979). Safeguards under the Bail Reform Act are enumerated in Salerno at 11.

Petitioner was denied equal protection of the Bail Reform Act when he was detained, presumably for his own welfare, with no claim of being dangerous to another person or to the community, contrary to requirements of 18 U.S.C. Section 3142(f).

In the decision of this Court that drug addiction is not a crime, Former Justice Stewart wrote:

> Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold. Robinson v. California, 370 U.S. 661, 667 (1962).

To paraphrase Former Justice Stewart,

even one day in a "hospital" would be a cruel and unusual punishment for the "crime" of having "mental illness." It matters not whether it is called "punishment" or "treatment", paraphrasing Former Justice Fortas. In Re Gault, supra, at 50.

D. Involuntary treatment of petitioner conflicts with the Fourteenth Amendment and with decisions of this Court and other Circuits

Treatment of petitioner included solitary confinement without toilet or sink, and forced drugging. Such treatment conflicts with the decision of this Court that the mentally retarded under the Fourteenth Amendment had a right to reasonably safe conditions of confinement and freedom from unreasonable bodily restraints. Youngberg v. Romeo, 457 U.S. 307 (1982).

1. Solitary confinement, in an early decision of this Court, imposes more punishment than reform. Describing

solitary confinement, this Court wrote:

> A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. In Re Medley, 134 U.S. 160, 167-168 (1890).

Solitary confinement of petitioner conflicts with the decision of the Eleventh Circuit:

> (I)mposing isolation upon ... pre-trial detainee without notice or hearing ... warranted award of punitive damages ... in that reasonable person would have known that Constitution forbade such conduct. Hewett v. Jarrard, 786 F.2d 1080, 1082 (11th Cir. 1986).

2. Forced drugging conflicts with the decision of the D.C. Circuit in which Former Chief Justice Burger, then Justice Burger, wrote in a Jehovah's Witness case in support of his position that the courts ought not to order

hospital patients to receive blood transfusions against their will:

> (Constitutional protections) ... include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk. Application of President and Directors of Georgetown College, Inc., 331 F.2d 1010, 1017 (D.C. Cir. 1964).

Forced drugging conflicts with decisions of this Court and other Circuits in allowing mental patients to refuse drugs (even if incompetent: if they would have refused if competent). Mills v. Rogers, 457 U.S. 291 (1982), remanded as Rogers v. Okin, 738 F.2d 1 (1st Cir. 1984). See Rennie v. Kline, 720 F.2d 266 (3d Cir. 1983), remanded from 458 U.S. 1119 (1981).

Forced drugging conflicts with the Tenth Circuit's decision that:

> (1) individual has a constitutionally protected interest in making his own decision whether to accept or reject the administration of potentially dangerous drugs; (2) First Amendment concerns were involved because the communication of ideas implies the

> capacity to produce ideas, (3) forcible administration of anti-psychotic drugs to detainee could not be justified by the duty to treat a mentally ill detainee ... ; (4) administration of antipsychotic drugs could be justified ... only after less restrictive alternatives were considered. Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

Forced drugging conflicts with the Second Circuit's decision that a Christian Scientist stated a claim for damages resulting from forced drugging in violation of the First Amendment. Winters v. Miller, 446 F.2d 65 (2d Cir. 1971).

As Former Justice Stewart wrote:

> (E)ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker 364 U.S. 479, 488 (1966).

In petitioner's case, forced drugging was unnecessary, as petitioner was locked in solitary confinement sleeping.

E. Involuntary detention and forced treatment denied petitioner mental health rights

Petitioner was denied equal protection of the Mental-Health Systems Act, chiefly by not providing for (1) the least restrictive conditions possible, as provided under 42 U.S.C. Section 9501(1)(A)(ii), (2) privacy, as provided under Section 9501(1)(G), (3) confidentiality, as provided under Section 9501(1)(H), and (4) access to the telephone, as provided under Section 9501(1)(J).

F. Forced treatment violates human rights

Forced treatment violates human rights under the 1975 Helsinki Accords, signed by the United States, chiefly by subjecting petitioner to inhuman treatment. Many countries do not have civil commitment. Italy has a national law forbidding civil commitment:

> Acute care can be provided by the general hospital. But there is no compulsion. The client can leave the hospital when he or she chooses. Ian McNett, "International Psychology", APA Monitor, Washington, D.C.: American Psychological Association (January 1981) p. 9.

Lower courts need guidance from this Court on the applicability of laws governing civil commitment.

II

Dismissal prior to trial of petitioner's civil rights action, where petitioner alleged sufficient facts and presented documents to support his action, conflicts with the Seventh Amendment and with decisions of this Court and other Circuits

This Court decided:

> For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. ... And the complaint is to be liberally construed in favor of plaintiff. ... The complaint should not be dismissed unless it appears that appellant could "prove no set of facts in support of his claim which would entitle him to relief." Jenkins v. McKeithern, 395 U.S. 411, 421 (1969), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974); United States v. Diebold, 369 U.S. 654, 655 (1962).

The Ninth Circuit found that, where plaintiffs based claim for liability directly on unconstitutional policies or customs, it is erroneous for district court to dismiss individual defendants.

Sanders v. Kennedy, 794 F.2d 478, 482 (9th Cir. 1986). The Third Circuit found that, where complaint averred private citizens acted in concert with city officials, the complaint stated claim against private citizens. Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984). The Tenth Circuit, in a forced drugging case of a pretrial detainee, found that summary judgment could not be granted where there was doubt from the evidence that (a) an emergency actually existed, and (b) if an emergency existed whether forcible medication for an indefinite period was an exaggerated response. Bee, supra, at 1396-97.

In petitioner's case, factual and legal disputes exist (apart from the issues of state action and responsibility): chiefly, whether petitioner threatened to harm himself, whether he was mentally ill, whether an emergency existed, whether the

oral or written order of the magistrate was valid, whether petitioner could be detained, whether he could be put in solitary confinement, whether drugs could be forcibly administered (especially where petitioner already was locked in solitary confinement sleeping).[7]

Factual disputes are best settled by a proceeding on the merits.

The core issue is not whether petitioner proved state action or responsibility on the part of respondents, but whether sufficient facts were alleged to proceed to trial. Petitioner alleged sufficient facts in the courts below to proceed to trial, or at least his complaint should not have been dismissed for failure adequately to allege state action or re-

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7. Some "facts" presented by the Fourth Circuit clearly are erroneous and never alleged by anyone: e.g., "charge filed against him in federal district court" and "stated he was very depressed". (App E-3) Also, "diagnosed as a chronic schizophrenic" (App E-4) is impossible, as explained at n. 3., supra.

sponsibility.

Petitioner not only alleged sufficient facts in his complaint but also attached supporting documents: (1) the detention order, showing prima facie evidence of state action of the hospital and health care providers and (2) a form showing Officer Moore as petitioner for commitment, establishing a causal link between his petition for commitment and the damages resulting from the ensuing detention and treatment.[8] Further discussion of these supporting arguments and documents is presented in Reasons III and IV, which follow.

Lower courts need guidance from this Court on the question of dismissing a civil rights complaint prior to trial despite allegations and documents sufficient to support the complaint.

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8. Moore's signed petition was Pretrial Exhibit (P-4).

III

The Fourth Circuit's decision that respondent hospital and health care providers are not state actors conflicts with decisions of this Court and other Circuits

A. A detention order is prima facie evidence of state action, whether the order is valid or invalid

Respondent hospital and health care providers imposed involuntary detention and forced treatment on petitioner under authority of a detention order, issued by the state under Virginia Code Sections 37.1-67.1 and 37.1-67.4, prima facie evidence of state action. The detention order proves state action, or color of law, whether the order is valid or invalid, or whether the statute is constitutional or unconstitutional. A detention order is the exclusive prerogative of the state, proof of state action.

Decisions of this Court suggest it is the exclusive prerogative of the state to confine persons involuntarily in a mental

institution. Addington, supra, 426-27; O'Connor, supra, 575-76. In this context, the state takes on a custodial function, owing a duty not only to the institutionalized person but to the public. Polk County v. Dodson, 454 U.S. 312, 319 (1981).

Once the state curtails a person's liberty through the civil commitment process, it assumes affirmative obligations, imposed by the Constitution, for the person's care and well-being. Youngberg, supra, 315-19 (1982). If the state delegates these responsibilities, and a private hospital willingly assumes them, then neither can argue that the private hospital's acts and omissions do not occur under state action, or color of law. To hold otherwise would allow the state to avoid its constitutional obligations simply by delegating its responsibilities to the hospital for the care of persons the state involuntarily confines.

Johnson v. Orr, 780 F.2d 386 (3d Cir. 1986) (state action if close nexus between the state and the challenged action). Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986) (state action on part of hospital and private physicians in dismissing physician for criticizing emergency room conditions). Ort v. Pinchbach, 786 F.2d 1105, 1107 (11th Cir. 1986) (physician who contracts with the state to provide medical care to inmates acts under color of law, performing a function which is traditionally the exclusive prerogative of the state when he took over the state's responsibility for attending to inmate medical needs). Ancata v. Prison Health Services, Inc., 769 F.2d 700, 703 (11th Cir. 1985) (private health service providing care in county jail a state actor). Morrison v. Washington County, Ala., 700 F.2d 678, 683 (11th Cir. 1983) (material fact issue existed precluding summary

judgment in favor of hospital, physician, county, and county commissioners). Milonas v. Williams, 691 F.2d 931, 939-40 (10th Cir. 1982) (private school in which students were involuntarily placed by the state acted under color of law).

This Court held that a person exercising powers given to him by the state but not given to the general citizenry is "clothed with the authority of state law," and a state actor. United States v. Classic, 313 U.S. 299, 326 (1941). See Jennings v. Shuman, 567 F.2d 1213, 1220 (3d Cir. 1977) (private citizen appointed as assistant special prosecutor fell within the Classic standard).

B. Joint action with state officials in a procedural scheme created by statute causing deprivation of constitutional rights is state action

This Court found that a private party's joint action with state officials in a procedural scheme created by statute -

causing deprivation of constitutional rights is state action. Lugar v. Edmondson Oil Co. Inc., 457 U.S. 972 (1982). A similar decision was made by the Third Circuit. Henderson v. Fisher, 631 F.2d 1115, 1118-19 (3d Cir. 1980) (campus police were state actors).

This Court made similar decisions in regard to conspiracy allegations. Tower v. Glover, 467 U.S. 914 (1984) (complaint adequately alleged conduct "under color of" state law in view of the conspiracy allegations). Adickes v. S. H. Kress and Company, 398 U.S. 144 (1970) (private party involved in conspiracy with state officials may be liable for civil rights action).

In petitioner's case, the hospital and health care providers jointly participated with police officers and magistrates (state officials) to obtain a detention order (in a procedural scheme

created by statute, or by conspiracy) causing deprivation of petitioner's constitutional rights under the Fourteenth Amendment.

C. Cases cited by the Fourth Circuit are distinguished from petitioner's case: the Fourth Circuit overlooks petitioner's arguments of state action based chiefly on the detention order

The Fourth Circuit overlooks arguments of state action based chiefly on the fact that respondent hospital and health care providers involuntarily detained and treated petitioner against his will on the basis of a detention order, an exclusive prerogative of the state and issued by the state under Virginia statute.

Each case now is discussed separately:

1. The Modaber case is cited by the Fourth Circuit to establish that federal funds do not transform a private hospital into a state actor. Modaber v. Culpeper Memorial Hospital, Inc., 674 F.2d 1023

(1982). In citing Modaber the Fourth Circuit overlooks petitioner's argument of state action based chiefly on the presence of a detention order, not receipt of federal funds. Petitioner believes that a private hospital can be a state actor, regardless of whether it receives federal funds, especially if it involuntarily detains and treats on the basis of the detention order.

2. The Hall case is cited by the Fourth Circuit to establish that participation in detention proceedings will not make a health care provider a state actor. Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980). Petitioner believes the Fourth Circuit misapplied or misinterpreted Hall. Hall states:

> (T)here was lack of state action as to ... physician ... , where physician examined, under court appointment, civil rights plaintiff in connection with involuntary commitment proceeding. Id, at 1154.

In petitioner's case, such examining physician was Dr. Cooper, who never was a party to petitioner's suit. The health care providers in petitioner's case involuntarily detained and treated, far different from examining, as in Hall. Petitioner believes that health care providers can be state actors, regardless of whether they participate in detention proceedings (i.e., examine), especially if they involuntarily detain and treat on the basis of a detention order.

3. The Calvert case is cited by the Fourth Circuit to establish that physicians who are compensated by the state are not state actors even though they earn the bulk of their compensation from private practice. Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984). Petitioner believes the Fourth Circuit misapplied or misinterpreted Calvert. Calvert was a prisoner who wanted treatment for an orthopedic problem, and

was referred to a specialist who saw but did not treat him although Calvert paid him. In short, Calvert wanted treatment, paid for it, but did not receive it: petitioner did not want treatment which was forced on him and for which the state paid. Calvert states:

> The provision of medical services performed by private physicians and paid for by the prisoner ... is not within the exclusive prerogative of the state. ... His obligation was not to the mission of the state but to treat patients referred to him by other physicians. He did not act under color of state law. Id, at 864 (emphasis added).

In petitioner's case, state action existed because the hospital and health care providers by involuntarily detaining and treating petitioner against his will on the basis of a detention order (an exclusive prerogative of the state and issued by the state under Virginia statute) assumed "an obligation to the mission that the State, through the institution, attempts to

achieve." Id, at 864, citing Polk County, supra, at 450-451. Petitioner believes that physicians can be state actors, regardless of whether they are compensated by the state, especially when they involuntarily detain and treat on the basis of a detention order.

Lower courts need guidance from this Court on the question of state action, where a hospital and health care providers involuntarily detain and treat on the basis of a detention order.

IV

The Fourth Circuit's decision that respondent police officers are not responsible for damages (or have good faith immunity) conflicts with decisions of this Court and other Circuits

A. Respondent police officers should have known they violated petitioner's constitutional rights despite a magistrate's order

This Court decided:

(A)n officer who seeks an arrest warrant by submitting a complaint and

> supporting affidavit to a judge is not entitled to immunity unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause. ... In Leon, we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." 468 U.S., at - , n. 23, 104 S.Ct., at 3421, n. 23. The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. Malley v. Briggs, 106 S.Ct. 1092, 1095, 1098 (1986) (footnote omitted).

The Fourth Circuit's decision conflicts with other decisions of this Court. United States v. Gouveia, 104 S.Ct. 2292, 2298 (1984) (speedy trial cases hold that Sixth Amendment right to attorney may attach as early as the time of "arrest and holding"). Thompson v. Louisiana, 105

S.Ct. 409 (1984) (warrantless search not constitutionally permissible). Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search not justified and statements made in hospital were not voluntary and could not be used).

The Fourth Circuit also conflicts with other Circuits. BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986) (police not entitled to good faith immunity arresting parents for child neglect). New v. Minneapolis, 792 F.2d 724, 725 (8th Cir. 1986) (allegations of fabricated charges or arrest without probable cause are not foreclosed by the existence of state tort remedies). Depew v. City of St. Marys, Georgia, 787 F.2d 1496 (11th Cir. 1986) (city liable where it knowingly approved a pattern of police conduct). Dennis v. Warren, 779 F.2d 245 (5th Cir. 1985) (no probable cause or reasonable suspicion in nonfelony arrest). Patzner v. Burkett,

779 F.2d 1363 (8th Cir. 1985) (officers who make warrantless arrest in home for nonfelony are not entitled to qualified immunity defense). Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981) (immunity may not be based solely on the fact that defendant was following instructions).

In petitioner's case, police should have known they violated petitioner's constitutional rights when they took him from his home on an oral order from a magistrate with no indication of distress. They should have known the magistrate had no authority to issue an oral order on a civil matter under Virginia Code Section 37.1-67.1, especially without a complaint and without the advice of a person skilled in diagnosis or treatment.

When petitioner discovered he was taken to a hospital and tried to leave,

police should have known they violated petitioner's constitutional rights when they refused to let him leave, see the magistrate, call an attorney, or use a phone, telling petitioner they might let him leave if he answered Nurse Fortescue's questions, an interrogation lasting over three hours. Police should have known that their encouragement of Nurse Fortescue's search of petitioner's religious and philosophical beliefs was illegal despite a magistrate's oral order.

Petitioner spoke to about six police officers, none of whom would sign a petition, except Officer Moore based on what Nurse Fortescue said, even though he should have known he lacked probable cause because: (1) his direct observation of petitioner showed no cause for alarm, (2) there was no substantiation by anyone of the false hearsay that petitioner threatened to harm himself, and should have

known that the magistrate who gave the written order never spoke to petitioner and was not the same magistrate petitioner spoke with on the phone earlier, (3) he knew Fortescue was a nurse and should have known she was not skilled in diagnosis or treatment, according to Virginia Code Section 54-273, (4) he should have known only a judge or magistrate, not a police officer, could rely on the advice of a person skilled in diagnosis or treatment for purposes of detention, according to Virginia Code Section 37.1-67.1, (5) he should have known Fortescue's advice was based on her objections to petitioner's refusal to take drugs and on his harmless religious and philosophical beliefs, which is no basis for calling petitioner mentally ill (psychotic) and depriving him of his freedom.[9]

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9. Also see n. 2, supra.

Further, police should have known they violated petitioner's constitutional rights when they detained him on the basis of a magistrate's written order, which they should have known was invalid on its face because: (1) the magistrate wrote he relied on the advice of Nurse Fortescue, who they should have known was not skilled in diagnosis or treatment, as required by law, (2) they should have known the magistrate who wrote the order never spoke to petitioner, and that there was no substantiation by anyone of the false hearsay that petitioner threatened to harm himself, and (3) they should have known it was unconstitutional to involuntarily detain and treat petitioner for up to three days prior to a hearing, with no detention hearing, no attorney, and no claim petitioner was dangerous to another person.

Police also should have known they violated petitioner's constitutional

rights when they put him into solitary confinement without notice or hearing.

Officer Moore persisted, signing another petition for commitment without probable cause at a preliminary commitment hearing two days later, and was present the following day as petitioner at the commitment hearing.

These constitutional violations, as presented in the complaint, concerned: (1) the First Amendment (free speech, and freedom of religious and philosophical beliefs), (2) the Fourth Amendment (security against unreasonable searches and seizures, and no warrants without probable cause), (3) the Sixth Amendment (hearings, and counsel), and (4) the Fourteenth Amendment (freedom from state laws violating constitutional rights, and no state deprivation of liberty without due process and equal protection).

B. The police are responsible for the natural consequences of their actions, and there is a causal link between Officer Moore's petition for commitment and the ensuing involuntary detention and treatment

This Court decided:

> As we stated in Monroe v. Pape, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961), Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read Section 1983 as recognizing the same causal link. Malley, supra, at 1098, n. 7, (emphasis added).

In petitioner's case, the police are responsible for damages resulting from their participation in detaining petitioner involuntarily for treatment, especially where Officer Moore signed a petition for the involuntary detention and treatment, and should have known he lacked probable cause.

C. The Thompson case cited by the Fourth Circuit is distinguished from petitioner's case: chiefly, respondent police officers should have known they violated petitioner's constitutional rights despite a magistrate's order

The Thompson case is cited by the Fourth Circuit to establish that due process is not violated by police officers who rely upon an order in good faith which is subsequently determined to be invalid. Thompson v. Prince William County, 752 F.2d 363 (4th Cir. 1985).

Thompson concerns the arrest of a wrong person with the same name, where the court found probable cause and a valid warrant. In petitioner's case, no decision was made on probable cause or whether the oral or written detention order was valid.

Petitioner believes the police violated due process, whether the order was valid or invalid, because the police

should have known they violated petitioner's constitutional rights despite a magistrate's order, and Officer Moore should have known he lacked probable cause to petition for commitment.

Lower courts need guidance from this Court on the question of responsibility of police officers in causing damages of persons whom they cause to be involuntarily detained and treated.

V

Civil commitment raises important and unresolved problems

The constitutional rights of the mentally ill have long been important to Congress.[10] The matter also is important

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10. See, Care of Institutionalized Mentally Disabled Persons (1985), Joint Hearings, United States Senate, Ninety-ninth Congress, Washington, D.C., U.S. Government Printing Office; Quality of Health Care--Human Experimentation (1975), Hearings, United States Senate, Ninety-third Congress, Washington, D.C.; U.S. Government Printing Office; Constitutional Rights of the Mentally Ill (1970), supra, n. 6.; Constitutional Rights of the Mentally Ill (1961), supra, n. 6.

to professional and citizen organizations opposing civil commitment.[11] And the matter is important to providers and consumers of mental health services throughout the country.[12]

The matter is of general public interest, particularly important to all persons subjected to civil commitment and involuntary detention:

> A 1982 report by the (Virginia) state Department of Mental Health and Mental Retardation found there was insufficient evidence to justify committing one of every three people studied. State officials said the figures reflected in part speedy and informal court hearings. Sandra G. Boodman, "Against Their Will", in The Washington Post (January 8, 1984), Page One, A12.

Admissions to mental institutions from July 1, 1982 to June 30, 1983 in

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11. Such as, American Association for the Abolition of Involuntary Mental Hospitalization, Inc., 301 Sedgwick Drive, Syracuse, N.Y. 13203. And Citizens Commission on Human Rights, 4317 Fessenden Street, N.W., Washington, D.C. 20016.

12. See, e.g., Mental Health Directory for 1985, Washington, D.C., U.S. Government Printing Office (1985).

Virginia totaled 10,030 (including persons admitted more than once), consisting of 6,167 involuntary commitments and 3,849 voluntary admissions, many of whom were detained involuntarily and then commited themselves voluntarily under prospect of a court order. Id.

Psychiatric abuse is of general public interest. Cf., CBS Television Broadcast of 60 Minutes (January 4, 1987), in a report by Mike Wallace on the San Diego County Mental Health facility at Hillcrest, where on average one person a month dies from psychiatric abuse or neglect in circumstances remarkably similar to those of petitioner: forced drugging in solitary confinement despite allergic reactions. Petitioner himself nearly did not survive to complain.

Hillcrest is the first hospital in the United States excluded from participating in Medicare because of quality

deficiences. CBS Television Transcript, 60 Minutes (January 4, 1987) p. 3.

In speaking of Hillcrest, Assistant (San Diego) County Administrative Officer David Jensen said:

> This probably is the best facility in the nation. ... We're very proud of it." Id., p. 7.

And hospital administrator Karen Lee Robinson said:

> (W)hat's going on in this hospital is the same as what's going on in New York, in St. Louis and on the West Coast. ... This hospital is probably better than most hospitals ... like it across the nation." Id., p. 8.

In view of the dangers and quality deficiencies found among the best hospitals in the country, and in view of the fact that the state forces such treatment on persons who have committed no crime, the public and lower courts need guidance from this Court in clarifying due process issues involved in civil commitment procedures.

CONCLUSION

For these various reasons, this petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit that respondent hospital and health care providers are not state actors and that respondent police officers are not responsible for damages (or have good faith immunity): (1) Virginia statute on involuntary detention and treatment is unconstitutional, where there is no provision for a detention hearing or no claim of being dangerous to another person, (2) petitioner alleged sufficient facts (and presented sufficient documents to support state action and responsibility for damages on the part of respondents), so dismissing his civil rights action violates his right to trial, (3) a detention order (an exclusive prerogative of the state and issued by the state under Virginia statute) is prima

facie evidence of state action, where respondent hospital and health care providers depended on such order to involuntarily detain and treat petitioner against his will, (4) respondent police officers are responsible for damages resulting from involuntary detention and treatment, where they should have known they violated petitioner's constitutional rights despite a magistrate's order, and where such involuntary detention and treatment resulted from a petition for commitment signed by a police officer without probable cause, and (5) important and unresolved problems exist of due process in civil commitment procedures.

In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider summary reversal and remanding the matter to the district court for trial or other appropriate disposition.

Respectfully submitted,

July 15, 1987

GEORGE BREWSTER
3407 Wessynton Way
Alexandria, VA 22309
(703) 360-7092

Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (Alexandria); George Brewster v. The Mount Vernon Hospital, et al.; No. 85-0847-A; August 23, 1985.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

George Brewster,

Plaintiff,

CIVIL ACTION NO. 85-0847-A

v.

The Mount Vernon Hospital, et al.

Defendants.

O R D E R

For reasons stated in open court, it is accordingly

ORDERED:

(1) that defendants Mirmirani and Robertson's Motion to Dismiss is GRANTED on the grounds of lack of jurisdiction;

(2) that the clerk shall forward certified copies of this Order to all counsel of record.

August 23, 1985
Alexandria, Virginia

(James C. Caceris)
U.S. District Judge

APPENDIX B-1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (Alexandria); Brewster v. Mount Vernon Hospital, et al.; August 30, 1985

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

George Brewster,

Plaintiff,

CIVIL ACTION
No. 85-0847-A

v.

The Mount Vernon Hospital, et al.

O R D E R

For reasons stated in open court, it is accordingly

ORDERED:

(1) that Motion to Dismiss of defendants The Mount Vernon Hospital, Jil Inskeep, Bernadette Lester, Sarah Fogelson, Ann Fortescue and Millie Wright is GRANTED on the grounds of lack of jurisdiction.

(2) that the Motion to Dismiss filed by David A. Hetzer, a Magistrate, is

GRANTED on the grounds of immunity;

(3) that the Clerk shall forward certified copies of this Order to all counsel of record.

August 30, 1985
Alexandria, Virginia

(James C. Cacheris)
U.S. District Judge

(certified)

APPENDIX C-1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (Alexandria); Brewster v. Mount Vernon Hospital, et al.; October 21, 1985.

IN THE UNITED DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

George Brewster

Plaintiff,

Civil Action No. 85-0847-A

v.

The Mount Vernon Hospital, et al.

Defendants.

O R D E R

For reasons stated in open court, October 18, 1985, it is accordingly

ORDERED:

(1) that the Motion to Dismiss of Donald Burlington, M.D., be, and the same hereby is, GRANTED on the grounds of lack of jurisdiction;

(2) that the Clerk shall forward certified copies of this Order to all counsel of record.

APPENDIX C-2

October 21, 1985
Alexandria, Virginia

(James C. Cacheris)
U.S. District Judge

(certified)

APPENDIX D-1

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA (Alexandria); Brewster v. Mount Vernon Hospital, et al.; November 22, 1985.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

George Brewster

Plaintiff, CIVIL ACTION NO. 85-0847-A

v.

The Mount Vernon Hospital, et al.

Defendants.

O R D E R

For reasons stated in open court, it is accordingly

ORDERED:

(1) that the plaintiff's motion for Reconsideration and Reversal of Orders Sustaining Motions for Summary Judgment in favor of Defendant Health Care Providers and Defendants Aunon and Hetzer be, and the same hereby is, DENIED;

(2) that the Motion of defendant Jose

Aunon, pursuant to Rule 11, Federal Rules of Civil Procedure, is WITHDRAWN:

(3) that the Motion of defendants Robertson and Mirmirani for a final, appealable Order pursuant to Rule 54(b), Federal Rules of Civil Procedure, be, and the same hereby is, GRANTED;

(4) that the Clerk shall forward certified copies of this Order to all counsel of record.

(certified)

November 22, 1985
Alexandria, Virginia

(James C. Cacheris)
U.S. District Judge

APPENDIX E-1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT; George Brewster v. John Doe, No. 1, et al.; Nos. 86-2002, 86-2012; March 19, 1987.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 86-2002
86-2012

George Brewster, Appellant,

versus

John Doe, No. 1; John Doe, No. 2; Linda Anderson; The Mount Vernon Hospital; Burlington MaGuire, M.D.; Robert H. Robertson, M.D.; Nooreddin Mirmairani, M.D.; Anne Fortescue; Jill Inskeep; Bernadette Lester; Robert W. Gideon; William A. Moore; David A. Hetzer; Jose Aunon; Millie Wright; Sarah Fogelson; and Donald Burlington, M.D. Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (C/A 85-847-A)

Argued: January 6, 1987
Decided: March 19, 1987

Before HALL and WILKINSON, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Ralph L.Payne on brief for appellant; John J. Brandt (Robert S. Corish; Slenker, Brandt, Jennings & Jennings) Robert Lyndon Howell, Senior Assistant County Attorney (David T. Stitt, County Attorney;Randolph D. Frostick; Miles & Stockbridge; George A. McAndrews; Gary A. Godard & Associates on brief) for appellees.

APPENDIX E-3

PER CURIAM:

George Brewster appeals from the district court's order granting the defendants' motion for summary judgment and their motion to dismiss this action brough pursuant to 42 U.S.C. Section 1983. We affirm.

I.

On July 23, 1983, Brewster, a 46 year-old resident of Fairfax County, Virginia, telephoned a Fairfax County magistrate and asked that a pending indecent exposure charge filed against him in the federal district court be dropped. During the conversation, appellant threatened to harm himself and stated that he was very depressed. Moments later, the magistrate orally directed the Fairfax County police to pick up Brewster at his home and transport him to the nearby Mt. Vernon Community Mental Health Center ("Mt. Vernon") for a mental evaluation.[1] The

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[1] The magistrate's oral order was followed several hours later by a written detention order.

police officers carried out the order. Brewster was subsequently kept under observation at Mt. Vernon for three days and was diagnosed as a chronic schizophrenic. On July 26, 1983, Brewster was released.

In July, 1985, appellant filed this civil right action pursuant to 42 U.S.C. Section 1983, alleging that he was denied due process of the law by police officers who detained him by transporting him involuntarily to Mt. Vernon. Brewster also contends that the health care providers practicing there, who kept and treated him against his will denied him due process. the district court granted the police officers' motion for summary judgment and dismissed Brewster's claim against Mt. Vernon and the health care providers finding no state action. This appeal followed.

II.

On appeal, Brewster contends that the district court erred in granting the police officers' motion for summary judgment based upon their good faith reliance upon the magistrate's order. Appellant also argues that Mt. Vernon and the health care providers are state actors because (1) Mt. Vernon receives federal funds, (2) the health care providers exercised a duty reserved to the state when it detained appellant against his will, and (3) the health care providers were paid by the state. We disagree with all these contentions.

Brewster suggests that the police officers violated his due process rights by carrying out a judicial order in good faith which he argues was issued without proper jurisdiction. Even assuming the order is invalid, we find no merit in this contention. We have held that due process

is not violated by police officers who rely upon an order in good faith which is subsequently determined to be invalid. Thompson v. PRINCE William County, 753 F.2d 363 (4th Cir. 1985). We have also held that receipt of federal funds does not transform a private hospital into a state actor, Modaber, M.D. v. Culpeper Memorial Hospital, 672 F.2d 1023 (1982).

Nor will participation in detention proceedings make a health care provider a state actor. Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980). Finally, we reject appellant's assertion that physicians who are compensated by the state are state actors even though they earn the bulk of their compensation from private practice. Calvert v. Sharpe, 748 F. 2d 861 (4th Cir. 1984).

III.

For the foregoing reasons, we accordingly affirm. AFFIRMED

APPENDIX F-1

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT: George Brewster v. John Doe, No. 1, et al.; Nos. 86-2002, 86-2012; April 17, 1987

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 86-2002
86-2012

George Brewster, Appellant,

versus

John Doe, No. 1, et al, Appellees.

On Petition for Rehearing with Suggestion For Rehearing In Banc.

O R D E R

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

APPENDIX F-2

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Wilkinson and Judge Haynsworth..

For the Court,

JOHN M. GREACEN

_____

CLERK

Supreme Court, U.S.
FILED
AUG 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-91

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE BREWSTER,

Petitioner,

v.

THE MOUNT VERNON HOSPITAL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ROBERT W. GIDEON AND WILLIAM A. MOORE

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Respondents Gideon and Moore

QUESTIONS PRESENTED

1. Whether police officers who executed a temporary detention order in accordance with the orders of a magistrate are entitled to good faith immunity from liability under 42 U.S.C. § 1983.

2. Whether the actions of police officers who executed a temporary detention order issued by a magistrate are the proximate cause of subsequent injury allegedly suffered by Petitioner during his hospitalization.

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No. 87-91

IN THE

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OCTOBER TERM, 1987

GEORGE BREWSTER,

Petitioner,

v.

THE MOUNT VERNON HOSPITAL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS ROBERT W. GIDEON AND WILLIAM A. MOORE

COME NOW Respondents Robert W. Gideon and William A. Moore, by counsel, and respectfully request that this Honorable Court deny the petition for writ of certiorari seeking review of the opinion

of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, appears as Appendix A hereto.

The transcript of the ruling of the United States District Court for the Eastern District of Virginia appears as Appendix B hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported and appears as Appendix C hereto.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Course of Proceedings

Petitioner George Brewster (hereinafter "Brewster") filed this 42 U.S.C. § 1983 action in the United States District Court for the Eastern District of Virginia on July 23, 1985, against two Fairfax County, Virginia, police officers, Robert W. Gideon and William A. Moore (hereinafter "Gideon" and "Moore"), as well as the Mount Vernon Hospital and a number of doctors and nurses (hereinafter "the health care providers"), and two magistrates.[1/]

1/ The two magistrates were dismissed at the trial court, and Brewster did not appeal that ruling. The district court also granted summary judgment in favor of the health care providers, and the court of appeals affirmed. Brewster's petition for writ of certiorari also seeks to have that decision reviewed. The health care providers have filed a separate brief in opposition to the petition for writ of certiorari.

Brewster alleged that the Respondents had temporarily detained him at the Mount Vernon Hospital for three days and treated him for mental illness, thereby unlawfully depriving him of his rights under the First, Fourth, Sixth, and Fourteenth Amendments. He demanded $2,000,000 in compensatory and punitive damages.

Gideon and Moore filed a motion for summary judgment, arguing that they were entitled to good faith immunity from liability and that their actions were not the proximate cause of the damages Brewster allegedly sustained at the hands of the health care providers. Gideon and Moore filed affidavits in support of their motion. Brewster filed no opposing affidavit. On December 20, 1985, the

district court granted summary judgment in favor of Gideon and Moore, and Brewster appealed that decision to the United States Court of Appeals for the Fourth Circuit.[2/] The court of appeals affirmed the judgment of the district court, ruling that the police officers were entitled to immunity because they had relied in good faith on the orders of a magistrate. Brewster now seeks a

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2/ The only error assigned by Brewster in his brief to the court of appeals with respect to the dismissal of Gideon and Moore was the district court's finding that the police officers' actions were not the proximate cause of his alleged injury during his hospitalization. Brewster did not appeal the district court's ruling that the police officers were entitled to good faith immunity from liability under 42 U.S.C. § 1983. Obviously, the police officers' good faith immunity would shield them from liability even if their actions had been the proximate cause of Brewster's alleged injury.

writ of certiorari to review that decision.[3/]

Statement of Facts

On July 23, 1983, Brewster telephoned a Fairfax County magistrate and asked that an indecent exposure charge against him be dropped. During the conversation, Brewster stated that he was very depressed and threatened to harm himself. The magistrate called the Fairfax County Police and reported that Brewster had threatened to commit suicide. Police officers were sent to Brewster's house. When they arrived, Brewster was still on the telephone with the magistrate.

3/ Although Brewster filed his Petition for Writ of Certiorari pro se, he was represented by counsel in both the district court and the court of appeals.

The police officers called the magistrate's office from a neighbor's house and confirmed that a civil mental temporary detention order for Brewster would be issued. The officers took Brewster to the Mount Vernon Hospital, where he was examined by the health care providers. The magistrate's oral communication was followed within a few hours by a written detention order. Brewster was hospitalized for three days and discharged after a civil commitment hearing with a diagnosis of schizophrenic disorder, chronic undifferentiated type.

SUMMARY OF ARGUMENT

The district court granted summary judgment in favor of Gideon and Moore on two bases. It held that the police officers were immune from liability under 42 U.S.C. § 1983 for detaining

Brewster because their actions were taken in good faith, and also that the officers' actions were not the proximate cause of the injury that Brewster allegedly suffered after his admission to the hospital. (App. B).

The district court's decision was correct on both bases. The police officers detained Brewster pursuant to the orders of a magistrate and the general orders of the Police Department. Since a reasonable officer could have believed that Brewster's detention was lawful in light of established law and the information the officers possessed at the time, Gideon and Moore are immune from liability under 42 U.S.C. § 1983. Moreover, the health care providers independently decided to subject Brewster to a course

of medication and treatment during his hospitalization. Their actions, and not those of the police officers, were the proximate cause of Brewster's alleged injury. Therefore, the petition for writ of certiorari should be denied.

ARGUMENT

I. THE POLICE OFFICERS ARE IMMUNE FROM LIABILITY UNDER 42 U.S.C. § 1983 BECAUSE THEY DETAINED BREWSTER IN GOOD FAITH PURSUANT TO THE ORDERS OF A MAGISTRATE.

The district court correctly granted summary judgment in favor of Moore and Gideon on the basis that they were entitled to good faith immunity because Brewster was detained pursuant to the orders of the magistrate and the general orders of the police department.

Law enforcement officers are entitled to qualified immunity from liability

under 42 U.S.C. § 1983 for allegedly unconstitutional searches or arrests. This Court has established the standard of "objective legal reasonableness" to determine the extent of that immunity. Anderson v. Creighton, 55 U.S.L.W. 5092, 5093 (U.S. June 25, 1987); Malley v. Briggs, 475 U.S. 335, 341 (1986). An officer loses the shield of immunity only if a given search or arrest is so lacking in indicia of probable cause as to render his belief in its existence unreasonable. Malley v. Briggs, 475 U.S. at ____; 89 L.Ed.2d 271, 281. Similarly, the officer is entitled to summary judgment on qualified immunity grounds if he can establish as a matter of law that a reasonable officer could have believed the search or arrest to be lawful, in light of clearly established

law and the information the officer possessed at the time. Anderson v. Creighton, 55 U.S.L.W. at 5093.

The actions of the police officers in detaining Brewster clearly meet the objective reasonableness standard and entitle them to summary judgment. A reasonable officer not only could have, but would have believed that the detention was lawful in light of established law and the information that the police officers possessed at the time. The officers knew that the magistrate had summoned them because Brewster had threatened to commit suicide, and that a written detention order would be issued. They knew that an emergency existed in that Brewster could injure or kill himself if they did not comply with the magistrate's order. Under Virginia law, the magistrate had

the authority to order Brewster's detention for up to seventy-two hours on his own motion based upon probable cause. Va. Code § 37.1-67.1 (1984).[4/] A reasonable officer would not believe that temporarily detaining a suicidal individual for a mental evaluation under these circumstances would violate his constitutional rights.[5/] The police

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4/ The Virginia statute regarding civil mental temporary detention orders that was in effect at the time that Brewster was admitted to the Mount Vernon Hospital is codified at Va. Code § 37.1-67.1 (1984). The current version of this statute can be found at Va. Code § 37.1-67.1 (Supp. 1987). The statute has been amended since this action was filed in minor respects which are not germane to this action.

5/ In order to overcome the qualified immunity to which Gideon and Moore are entitled, Brewster must show that they violated a clearly established constitutional right. Anderson v. Creighton, 55 U.S.L.W. at 5093. Brewster argues at

(continued on next page)

officers' actions in detaining Brewster were reasonable. Therefore, they cannot be held liable under 42 U.S.C. § 1983. See McKinney v. George, 726 F.2d 1183 (7th Cir. 1984); Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982).

Brewster argues that the original order under which he was detained was oral rather than written and that this violates Virginia law. In fact, the

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5/ (continued)
length that any civil commitment of the mentally ill is per se unconstitutional, but cites no authority in support of that claim. This Court has previously ruled on the constitutionality of various aspects of civil commitment. See, e.g., Youngberg v. Romeo, 457 U.S. 307 (1982); Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975). It has never ruled that civil commitment is per se unconstitutional. Therefore, Brewster has not demonstrated that the actions of the police officers violated a clearly established constitutional right.

statute under which the detention order was issued does not specifically require that such orders be in written form. Va. Code § 37.1-67.1 (1984). The general orders of the Fairfax County Police Department not only authorize but require officers to detain individuals upon receipt of an oral order of a magistrate. Moreover, the officers were advised that the magistrate would issue a written detention order, and in fact a written order was issued a few hours later.

In any event, even if the conduct of the officers constituted a technical violation of Virginia law, their actions do not rise to the level of a constitutional violation. The Constitution requires only that police officers have

probable cause to detain an individual. It is immaterial to the constitutionality of their conduct that the detention may have violated state law. McKinney v. George, 726 F.2d 1183 (7th Cir. 1984) (police officers who seized plaintiff and transported him to mental hospital upon probable cause but in violation of state law are immune from liability under 42 U.S.C. § 1983). See also Davis v. Scherer, 468 U.S. 183, 194 (1984) (state officials do not lose their qualified immunity from suit under 42 U.S.C. § 1983 merely because their conduct violates state statutes or regulations).

The motion for summary judgment and supporting affidavits filed in the district court by Gideon and Moore

clearly established that the police officers acted in good faith. In order to avoid summary judgment, Brewster could not rest upon the mere allegations of his pleadings. He was required to set forth, by affidavit or other permissible means, specific facts to demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e). Brewster failed to do so. In fact, he failed even to file an opposing affidavit in support of his opposition to the motion for summary judgment.

The reason is obvious. There were no facts that Brewster could have mustered to avoid summary judgment. Brewster's own Complaint demonstrates that the police officers were entitled to good faith immunity. Brewster, himself, alleges that when the police

officers detained him, they were "acting upon orders of a magistrate...." Complaint, para. 36. Brewster's real grievance is with the magistrate, not with Gideon and Moore. He contends that the magistrate misconstrued his statements on the telephone as a suicide threat. Even if this were true, it is irrelevant. The police officers were told that Brewster had threatened to commit suicide, and they had no reason to disbelieve that report. In light of the undisputed fact that the police officers were acting on the orders of a magistrate, there was no genuine issue for trial and the district court correctly granted summary judgment in favor of Gideon and Moore.

II. THE ACTIONS OF THE POLICE OFFICERS WERE NOT THE PROXIMATE CAUSE OF THE INJURY BREWSTER ALLEGEDLY SUFFERED DURING HIS HOSPITALIZATION.

The district court correctly found that the actions of the police officers in detaining Brewster were not the proximate cause of the subsequent injury that he allegedly suffered during his hospitalization. (App. B.) The officers merely delivered Brewster to the hospital for evaluation. Upon completion of the evaluation, the health care providers independently decided to subject Brewster to a course of medication and treatment. The actions of the health care providers, and not the police officers, were the proximate cause of the injury that Brewster allegedly suffered as a result of that medication

and treatment. Therefore, Gideon and Moore were entitled to summary judgment in their favor on that issue. See Martinez v. California, 444 U.S. 277 (1980) (murder victim's death too remote a consequence of parolee's release to hold state parole officials liable under 42 U.S.C. § 1983).

CONCLUSION

The district court correctly determined that Gideon and Moore were immune from liability under 42 U.S.C. § 1983 and that their actions were not the proximate cause of the injury that Brewster allegedly suffered during his hospitalization. The police officers were entitled to summary judgment in their favor and Brewster's petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

David T. Stitt
County Attorney

Robert Lyndon Howell
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Counsel for Respondents
Gideon and Moore

PROOF OF SERVICE

I hereby certify that three copies of the foregoing were mailed, postage prepaid, to George Brewster, pro se, 3407 Wessynton Way, Alexandria, Virginia 22309, Petitioner, and to John J. Brandt, Esquire, Slenker, Brandt, Jennings & Jennings, 3026 Javier Road, Fairfax, Virginia 22030, Randolph D. Frostick, Esquire, Miles and Stockbridge, 4096 Chain Bridge Road, Fairfax, Virginia 22030, and George A. McAndrews, Esquire, Gary A. Godard & Associates, 3975 University Drive, Fairfax, Virginia 22030, counsel for Respondents, this 14th day of August, 1987.

Robert Lyndon Howell
Robert Lyndon Howell

APPENDIX A

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

U.S. DEC 23 1985

GEORGE BREWSTER	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 85-0847-A
	)	
THE MOUNT VERNON HOSPITAL, et al.	)	
	)	
Defendants.	)	

ORDER

For reasons stated in open court, it is accordingly

ORDERED:

(1) that Defendants Gideon's and Moore's Motion for Summary Judgment be, and the same hereby is, GRANTED;

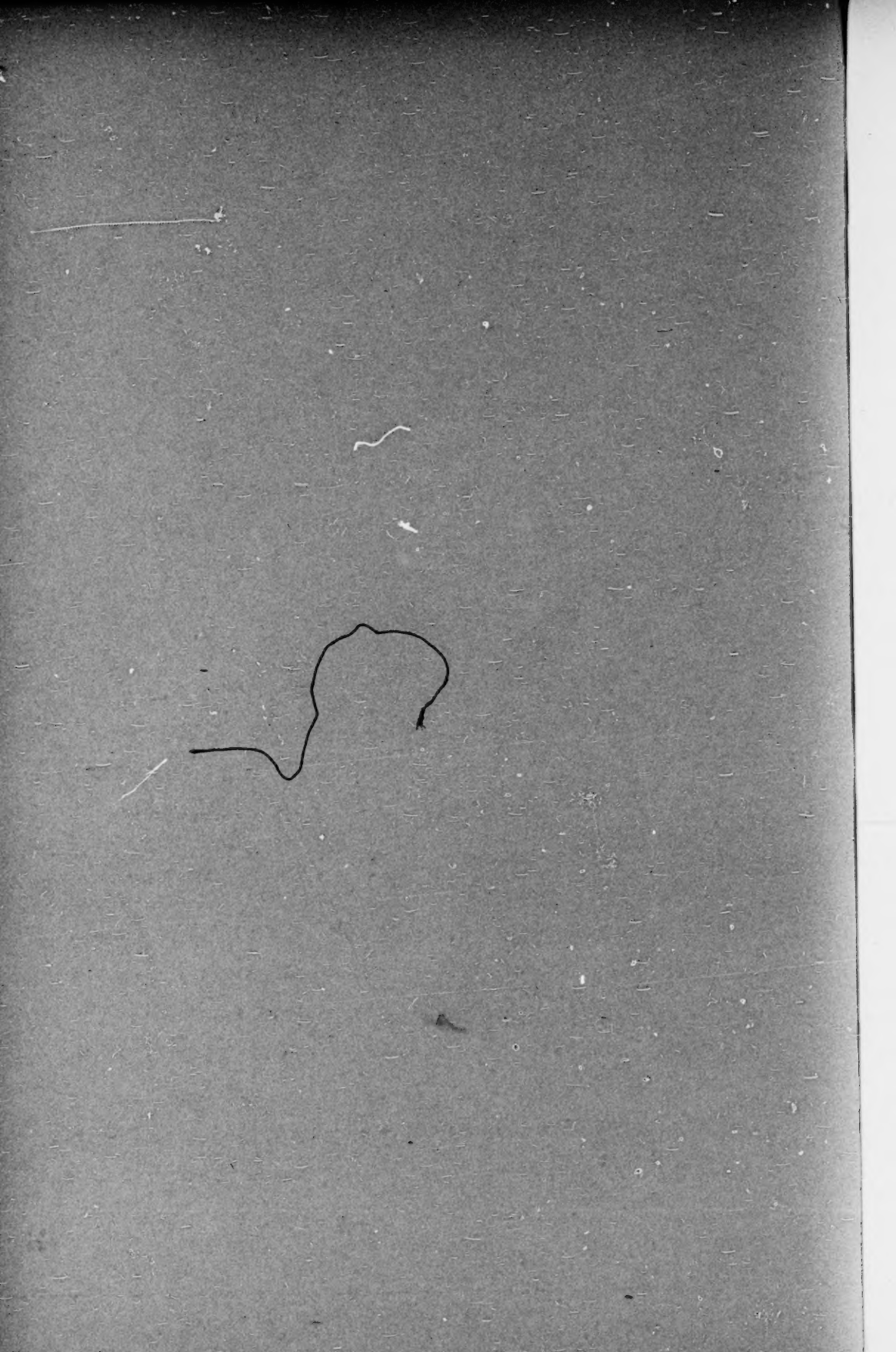
(2) that the Clerk shall forward certified copies of this Order to all counsel of record.

December 20, 1985
Alexandria, Virginia

United States District Judge

A True Copy
Teste: Fairfax Towers, Clerk
Ruth Wardman

APPENDIX B



THE COURT: Okay. Let me just say, I think I've read Wilson's affidavit. I'm going to assume Moore's is signed and what it indicates is that they were acting under the authority of the magistrate at the time they picked up Mr. Brewster. And this is a civil rights action pursuant to 42 U.S.C. Section 1983.

There are other allegations of false arrest and malicious prosecution. Certainly those claims are barred by the one year statute of limitations.

That brings us back to the 42 U.S.C. 1983 and the argument is, on the part of plaintiff, or his allegation, that he was kept in the hospital against his will, forced to take drugs in violation of his religious belief for which he seeks compensatory and punitive

damages against the officer.

The plaintiff claims compensatory and punitive damages for state law false arrest violations, constitutional deprivations. And the two persons now left are Gideon and Moore. The Court is satisfied that Gideon and Moore were acting as officers under the general order pursuant to what the oral order of the magistrate told them and so they have some qualified immunity as to the fact that they were acting on the basis of what they were told.

I think that the religious claim can be taken care of by the fact that anything that happened at the hospital would break the chain and that causation. The Court feels that the statute that they were acting under would give them good faith immunity.

And the case of Thompson v. Prince William is a strong case. It happened in this court where they arrested the wrong person. And the officers in that, on a warrant, arrested the wrong person. He was a different weight and height from the person they should have arrested. And summary judgment was granted in that one. Also Thompson v. Prince William is 753 Fed. 2nd 363, Fourth Circuit, 1985.

I think McInney versus Warden is also strong authority to grant the motion, 726 Fed. 2nd 1183.

The Court feels that the good faith immunity and acting under the authority of the statute and the magistrate would -- that they detained these plaintiff under reasonable reliance. On that basis, I'm going to grant the motion.

MR. GORDON: Thank you, Your Honor.

(Whereupon, at 10:25 a.m. the proceedings in the above-entitled matter was concluded.)

APPENDIX C

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2002

George Brewster,

Appellant,

versus

John Doe, No. 1; John Doe, No. 2; Linda Anderson, The Mount Vernon Hospital, Burlington MaGuire, M.D.; Robert H. Robertson, M.D.; Nooreddin Mirmairani, M.D.; Anne Fortescue; Jill Inskeep; Bernadette Lester; Robert W. Gideon; William A. Moore; David A. Hetzer; Jose Aunon; Millie Wright; Sarah Fogelson; Linda Anderson and Donald Burlington, M.D.,

Appellees.

No. 86-2012

George Brewster,

Appellant,

versus

John Doe, No. 1, John Doe, No. 2, Linda Anderson, The Mount Vernon Hospital, Burlington MaGuire, M.D., Robert Robertson, M.D., Nooreddin Mirmairani, M.D., Anne Fortescue, Jill Inskeep, Bernadette Lester, Robert W. Gideon, William A. Moore, David A. Hetzer, Jose Aunon, Millie Wright, Sarah Fogelson, Donald Burlington, M.D.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (C/A 85-847-A)

Argued: January 6, 1987 Decided: March 19, 1987

Before HALL and WILKINSON, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Ralph L. Payne on brief for appellant; John J. Brandt (Robert S. Corish; Slenker, Brandt, Jennings & Jennings) Robert Lyndon Howell, Senior Assistant County Attorney (David T. Stitt, County Attorney; Randolph D. Frostick; Miles & Stockbridge; George A. McAndrews; Gary A. Godard & Associates on brief) for appellees.

PER CURIAM:

George Brewster appeals from the district court's order granting the defendants' motion for summary judgment and their motion to dismiss this action brought pursuant to 42 U.S.C. § 1983. We affirm.

I.

On July 23, 1983, Brewster, a 46 year-old resident of Fairfax County, Virginia, telephoned a Fairfax County magistrate and asked that a pending indecent exposure charge filed against him in the federal district court be dropped. During the conversation, appellant threatened to harm himself and stated that he was very depressed. Moments later, the magistrate orally directed the Fairfax County police to pick up Brewster at his home and transport him to the nearby Mt. Vernon Community Mental Health Center ("Mt. Vernon") for a mental evaluation.[1] The police officers carried out the order. Brewster was subsequently kept under observation at Mt. Vernon for three days and was diagnosed as a chronic schizophrenic. On July 26, 1983, Brewster was released.

In July, 1985, appellant filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that he was denied due process of the law by police officers who detained him by transporting him involuntarily to Mt. Vernon. Brewster also contends that the health care providers practicing there, who kept and

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[1] The magistrate's oral order was followed several hours later by a written detention order.

treated him against his will denied him due process. The district court granted the police officers' motion for summary judgment and dismissed Brewster's claim against Mt. Vernon and the health care providers finding no state action. This appeal followed.

II.

On appeal, Brewster contends that the district court erred in granting the police officers' motion for summary judgment based upon their good faith reliance upon the magistrate's order. Appellant also argues that Mt. Vernon and the health care providers are state actors because (1) Mt. Vernon receives federal funds, (2) the health care providers exercised a duty reserved to the state when it detained appellant against his will, and (3) the health care providers were paid by the state. We disagree with all of these contentions.

Brewster suggests that the police officers violated his due process rights by carrying out a judicial order in good faith which he argues was issued without proper jurisdiction. Even assuming the order is invalid, we find no merit in this contention. We have held that due process is not violated by police officers who rely upon an order in good faith which is subsequently determined to be invalid. Thompson v. Prince William County, 753 F.2d 363 (4th Cir. 1985). We have also held that receipt of federal funds does not transform a private hospital into a state actor, Nodaber, M.D. v. Culpeper Memorial Hospital,

672 F.2d 1023 (1982). Nor will participation in detention proceedings make a health care provider a state actor. Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980). Finally, we reject appellant's assertion that physicians who are compensated by the state are state actors even though they earn the bulk of their compensation from private practice. Calvert v. Sharpe, 748 F.2d 861 (4th Cir. 1984).

III.

For the foregoing reasons, we accordingly affirm.

AFFIRMED

Supreme Court, U.S.
FILED
AUG 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-91

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGE BREWSTER

Petitioner

v.

MOUNT VERNON HOSPITAL, et al.

Respondents

OPPOSITION OF RESPONDENT HEALTH CARE PROVIDERS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPPOSITION OF RESPONDENT HEALTH CARE PROVIDERS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COME NOW respondents, The Mount Vernon Hospital, Burlington Maguire, M.D. (Donald Burlington, M.D.), Robert H. Robertson, M.D., Nooreddin Mirmirani, M.D., Ann Fortescue, Jill Inskeep, Bernadette Lester, Millie Wright and Sarah Fogelson (hereinafter "health care providers"), by their respective counsel, and present this their opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, stating as follows:[1]

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[1] Although Linda Anderson is listed as a party by Mr. Brewster, she never was served in the district court and no order of the district court referred to her from which Mr. Brewster could appeal.

QUESTION PRESENTED

Where health care providers administer psychiatric care/evaluation to a patient, following a civil temporary detention order, are they acting under color of law such that they may be liable for an alleged violation of the patient's civil rights?

STATEMENT OF FACTS

On July 23, 1983, Mr. Brewster telephoned a Fairfax County Magistrate, David A. Hetzer, concerning a pending indecent exposure charge against Mr. Brewster (App. 6, 54).[2] During the conversation, Mr. Brewster indicated to Magistrate Hetzer that he was threatening harm to himself (App. 54). Magistrate Hetzer

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[2] All references of this nature are to the appendix filed in the Fourth Circuit.

thereupon summoned the Fairfax County Police, who responded by sending police officers to pick up Mr. Brewster and transport him to The Mount Vernon Community Mental Health Center for mental evaluation by the various health care providers (App. 7).

While the original communication to the police officers was oral, it was followed by a written civil mental temporary detention order within a few hours (App. 14). Mr. Brewster arrived at the hospital at approximately 7:00 a.m. The health care providers were advised of his threats to harm himself (App. 54). He was observed for a period of three (3) days at which time he was discharged following a court order with a diagnosis

of schizophrenic disorder, chronic undifferentiated type (App. 92).[3]

LAW AND ARGUMENT

I.

PETITIONER'S CLAIM THAT VIRGINIA CODE SECTION 37.1-67.1 IS UNCONSTITUTIONAL IS NOT BEFORE THIS COURT

For the first time in this case, Mr. Brewster is now claiming that Virginia Code Section 37.1-67.1 (Repl. vol. 1984) is unconstitutional and deprived him of due process. The respondent health care providers submit that whether that code section is unconstitutional or not, does

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[3] In his statement of the case, Mr. Brewster alleges that he was given "mind altering drugs" and kept in "solitary confinement." While the health care providers deny any claimed or implied mistreatment of Mr. Brewster while at The Mount Vernon Community Mental Health Center, such allegations are not material to the issue of whether these health care providers acted "under color of state law."

not effect their status in this case, since they were not acting under color of law, as discussed infra. Since Mr. Brewster has raised this issue for the first time in his petition, it should not be considered by this Court. Tennessee v. Dunlap, 426 U.S. 312, 316, 96 Sup. Ct. 2099, 2101 (1976); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, 90 Sup. Ct. 1598, 1602-03 (1970).[4]

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[4] Interestingly, Mr. Brewster claimed that the procedures for obtaining the order under Virginia Code Section 37.1-67.1 were not followed by the respondents (Mr. Brewster's Brief of Appellant in the Fourth Circuit Court of Appeals, p. 9).

II.

HEALTH CARE PROVIDERS ADMINISTERING PSYCHIATRIC CARE TO A PATIENT, FOLLOWING A CIVIL TEMPORARY DETENTION ORDER, ARE NOT ACTING UNDER COLOR OF LAW AND THEY ARE NOT LIABLE FOR AN ALLEGED VIOLATION OF THE PATIENT'S CIVIL RIGHTS

The sole basis for federal jurisdiction in this case is an alleged violation of 42 U.S.C. § 1983 by the various respondents, both health care providers and police officers. While there is no dispute that the police officers acted under color of law in taking Mr. Brewster into custody pursuant to the direction of Magistrate Hetzer, this is not true of the health care providers.

In an attempt to establish that the health care providers acted under color of state law, Mr. Brewster alleged that "each and all of the acts of defendants were done by defendants not as private

individuals but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the Commonwealth of Virginia and the County of Fairfax, under the authority of . . . doctors and nurses acting under pretense of law . . . (App. 6). Examination of Mr. Brewster's complaint, however, reveals that he failed to allege sufficient facts to support his contention that the health care providers acted under color of state law. In paragraphs three (3) and four (4) of the complaint, Mr. Brewster alleges that The Mount Vernon Hospital is partly financed by government funds and that the other health care providers, nurses and physicians, are also paid with government funds (App. 5). The only reference to Nooreddin Mirmirani, M.D., by name, is in paragraphs four (4) and twenty-nine (29)

of the complaint. The sole allegation against him (other than payment with government funds) is that he "stated" that he was "plaintiff's doctor" and that he "had commenced to write prescriptions for more drugs but upon complaint of plaintiff modified the order" (App. 10, 11). Indeed, paragraph thirty (30) of the complaint states that plaintiff was not forced "to take any more drugs" after Dr. Mirmirani's appearance (App. 11). Yet, this negligible involvement in Mr. Brewster's care by Dr. Mirmirani is claimed to amount to state action under 42 U.S.C. § 1983.

Burlington Maguire, M.D. (Donald Burlington, M.D.) is alleged to have acted under color of state law by his simple act of signing The Mount Vernon Community Mental Health Center admission order (App. 8).

In paragraphs twenty (20) and twenty-one (21) of the complaint, Mr. Brewster alleges that Dr. Robertson prescribed certain drugs which were later administered to him (App. 9).

In paragraph sixteen (16) of the complaint, Mr. Brewster alleges that he was interrogated by Ann Fortescue, R.N., and that he told her that he did not wish to remain at the hospital (App. 8).

In paragraph eighteen (18) of the complaint, Mr. Brewster alleges that Jill Inskeep took him to room 12 on the third floor of the hospital building (App. 8) and he alleges in paragraph twenty-one (21) of the complaint that Millie Wright, R.N. administered drugs to Mr. Brewster against his will (App. 9). The sole allegation against Bernadette Lester, R.N. and Sarah Fogelson, R.N. is that

they were employees of the hospital (App. 5).

In this case, Mr. Brewster was present in The Mount Vernon Community Mental Health Center to be evaluated concerning his mental health. Mr. Brewster was not the subject of a commitment proceeding as he seems to suggest by repeated references to cases involving rights of a person being formally committed (Petition at 12-13, 26-27). The decisions cited by Mr. Brewster involve, for the most part, whether a particular state commitment procedure comported with federal constitutional due process, e.g. In Re Gault, 387 U.S. 1, 87 Sup. Ct. 1428 (1967). They do not address the issue of due process in the civil temporary detention proceeding such as authorized by Virginia Code Section 37.1-67.1 (Repl. vol. 1984). More importantly, those cases do not even

address the issue of whether there was state action or color of law acts by the individual defendants. Indeed, those decisions involved commitments to state institutions.

The purpose of Virginia Code Section 37.1-67.1 is not to formally commit an individual to a mental institution or facility, but instead to provide for medical evaluation of individuals to determine <u>if</u> commitment proceedings should be undertaken. The health care providers were not present to imprison Mr. Brewster, but to apply their medical judgment to evaluate his mental status. Of course, Mr. Brewster was present at the hospital and was not permitted to leave voluntarily. However, as in the case of medical treatment of a prison inmate, the purpose for which he was there was not custodial, but rather so

that the physicians and hospital staff could exercise their independent medical judgment in determining his mental status. Mr. Brewster made no allegation that anything other than medical judgment would be involved in this determination.

Moreover, the factual allegations in the complaint belie Mr. Brewster's argument that the health care providers restrained him. Aside from the conclusory allegation in paragraph sixteen (16) of the complaint that "the plaintiff was unlawfully detained by the policemen and by the above-mentioned hospital employees" (App.8), the facts alleged against the health care providers concern only the alleged wrongful provision of psychiatric medical care. Rather than showing that the health care providers exercised supervisory or custodial functions, Mr. Brewster's allegations

reveal that the health care providers functioned solely as providers of psychiatric care and evaluation.

This situation is very similar to that which occurred in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984) cert. den., 471 U.S. 1132, 105 Sup. Ct. 2667 (1985). The Fourth Circuit held that health care providers who treat prison inmates, and who are not direct employees of the state or prison, are not acting under color of law when they exercise their independent medical judgment in treating prisoners. The Calvert court reasoned that the state action requirement of 42 U.S.C. § 1983 was not meant to encompass what is essentially medical care/evaluation of an individual. Such a function is not traditionally the exclusive prerogative of the state.

In his petition, Mr. Brewster cites the decision of Morrison v. Washington County, Alabama, et al., 700 F.2d 678 (11th Cir. 1983). However, this decision not only does not support his argument, it supports the health care provider's position of non-state action. In Morrison the Eleventh Circuit concluded that a hospital may have acted under color of law where physician judgments were the product of non-medical considerations, i.e., how to get rid of a unruly patient. Id. at 683.

By contrast, the present case involved the allegation that the health care providers gave Mr. Brewster drugs which he did not want and which caused adverse reactions. He did not claim that the drugs were given for any non-medical reason or, for that matter, that any of the treatments/evaluations performed were

for non-medical purposes. This case thus becomes one of claimed medical malpractice.[5]

The decision of Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1985) is inapposite since the hospital/ defendant was conceded to be a publicly owned hospital and the individual employee/officials of the hospital therefore were held to be state actors.

In Robb v. City of Philadelphia, 733 F.2d 286 (3th Cir. 1984), the issue was whether a private citizen (Mann) acted in concert with city officials to deny the plaintiff (Robb) a promotion. It was

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[5] It should be noted that Mr. Brewster is currently pursuing a medical malpractice claim against some of these same respondent health care providers in the Fairfax County, Virginia Circuit Court, George Brewster v. Robert H. Robertson, M.D., At Law No. 71766 and George Brewster v. The Mount Vernon Hospital, et al., At Law No. 71767.

clear that the granting and/or denying of promotions for city employees such as Mann, was a city function. Yet, through the influence of Mann the city substituted the judgment of Mann for its own.

However, as was pointed out in Calvert, supra., medical judgment by private physicians are not the exclusive prerogative of the state. In the present case the health care providers' sole purpose was to provide medical evaluation of Mr. Brewster.

Furthermore, as the Robb court observed in commenting upon this Court's decision of Lugar v. Edmonson Oil Company, 457 U.S. 922, 102 Sup. Ct. 2744 (1982):

> [T]o the extent that petitioner challenged the constitutionality of the statute, he presented a valid cause of action; he did not insofar as he alleged only misuse or abuse

> [of] the statute because there was no state action.

733 F.2d at 291.[6]

Likewise, the worst that can be construed from Mr. Brewster's original complaint is that the health care providers allegedly abused their medical judgment.[7]

Mr. Brewster had originally placed great emphasis on the claimed funding of The Mount Vernon Hospital partially through government funds. While he has

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[6] As noted earlier in this opposition, Mr. Brewster never challenged the constitutionality of this statute in his complaint, the district court hearings or in the Fourth Circuit.

[7] This Court should also consider the practical chilling effect of a decision holding health care providers in this type of situation to be state actors. Health care providers are overwhelmed enough at this time with medical malpractice suits, much less the added exposure of civil rights claims such as this. Holding them liable for such claims will discourage health care providers from providing such services.

apparently modified that position on appeal, he contends that the health care providers cooperated with the police to detain him. However, as this Court observed in Blum v. Yaretsky, 457 U.S. 991, 102 Sup. Ct. 2777 (1983), a medically based judgment is not transformed into state action simply because the state regulates the activities of the health care providers, such as in Medicaid patients. 457 U.S. 991, 1009, 102 Sup. Ct. 2777, 2788. More closely analogous to the case sub judice is that presented in the decision of Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980). In Hall a court appointed psychiatrist was alleged to have acted under color of law with a judge and court appointed legal counsel to cause the plaintiff's involuntary commitment. Both the lawyer and the psychiatrist contended that there

was no federal jurisdiction over them since they were not acting under color of law, vis-a-vis the plaintiff. The Fourth Circuit concluded that in rendering professional services to an individual pursuant to a commitment procedure, the health care provider is not acting under color of law. Similarly, this Court determined in Polk County v. Dodson, 454 U.S. 312, 102 Sup. Ct. 445 (1981) that a publicly appointed and paid public defender was not acting under color of law in his representation of an indigent defendant. This Court concluded that "the decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the state." Likewise, while the health care providers in this case

were authorized to evaluate Mr. Brewster, their decisions were dictated by medical considerations, not by any regulations imposed by the state.

CONCLUSION

The allegations in the complaint clearly reveal that Mr. Brewster has failed to establish that the health care providers acted under color of state law. For these reasons, the petition fails to present a sufficient basis for granting of a writ, and these respondent health care providers request that the petition be denied.

Respectfully Submitted,

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(4)

No. 87-91

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GEORGE BREWSTER, Petitioner

v.

MOUNT VERNON HOSPITAL, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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24 pp

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REPLY TO BRIEFS IN OPPOSITION

Petitioner replies first to the Brief in Opposition of Respondents Hospital and Health Care Providers (Brief in Oppo. of Hospital), secondly to the Brief in Opposition of Respondents Police Officers Gideon and Moore (Brief in Oppo. of Police). Replies are listed in order of topics raised in the petition.

I

REPLY TO BRIEF IN OPPOSITION OF HOSPITAL

A. Ample reason to consider whether state statute is unconstitutional.

1. Raised in complaint.

The hospital argues that Brewster's claim that Virginia civil commitment statute is unconstitutional was raised "for the first time in his petition" and should not be considered (Brief in Oppo. of Hospital, p. 5).

Brewster clearly raised the unconstitutional issue of the state statute

throughout his complaint (App. 1-16)[1]: particularly paragraph 6, "Fourteenth Amendment" (App. 6); paragraph 8, "acts ... done ... under the color ... of the statutes ... of ... Virginia" (App. 6; and Brief in Oppo. of Hospital, p. 7); and paragraph 32 "detention order was in effect a nullity because there was no appearance before a magistrate or judge" (App. 11).

2. Raised in District Court.

Brewster raised the issue throughout his arguments in District Court, e.g., "we say they used a state statute and violated his constitutional rights" (App. 121). The District Court recognized the issue and implicitly decided the statute was constitutional when it stated, "The Court feels that the statute that they were acting under would give them good

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1. Such references are to the page of the Appendix filed with the Court of Appeals.

faith immunity" (App. 149; and Brief in Oppo. of Police, App. B Transcript p. 15).

3. Raised in Court of Appeals.

Brewster raised the issue throughout his appeal: e.g., "illegality of the Virginia statute" (Brief of Appellant, p. 19) and "It is clear that not only is the Virginia Statute illegal and unconstitutional ... " (Rebuttal Brief of Appellant, p. 4). The issue even was acknowledged by the appellees: "Those decisions involve for the most part whether a particular state commitment procedure comported with federal constitutional due process" (Brief of Appellees, p. 9).[2] The Fourth Circuit recognized the issue and implicitly decided the statute was constitutional when it affirmed the District Court's decisions (petition, App. E-6).

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2. An argument repeated in the Brief in Oppo. of Hospital (p. 10).

4. Precedent.

In another case in which the question of federal statutory preemption was not even raised in the petition, this Court granted certiorari and ordered the parties to argue the question, stating that the conflict was raised in the complaint, and acknowledged by both the District Court and the Court of Appeals. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698 (1984).

B. All parties participated in detaining or treating Brewster against his will.

Opposition of specific respondents (Brief in Oppo. of Hospital, pp. 7-10) was answered in the petition (pp. 26-35): they participated in detaining or treating Brewster against his will.[3]

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3. Respondents do not include Linda Anderson (Brief in Oppo. of Hospital, p. 1, n. 1). Brewster listed her because she was listed as an appellee (Brief of Appellant, p. 1 and cover; Rebuttal Brief of Appellant, p. 1 and cover; Brief of Appellees, p. 1).

C. Facts alleged by the hospital are scandalous and should be disregarded and striken.

The hospital cites an "indecent exposure charge" (Brief in Oppo. of Hospital, p. 2): misleading and inflammatory, as the charge was untrue, eventually dropped, and no lawful basis for attempting to commit Brewster to a mental institution.

The hospital alleges as fact that "Brewster indicated to Magistrate Hetzer that he was threatening harm to himself" (Brief in Oppo. of Hospital, p. 2): false and unsubstantiated. Brewster is the only available person with direct knowledge of his conversation, briefly explained in his petition (pp. 1-3), as Magistrate Gardner apparently now is retired and unavailable for questioning.

The hospital alleges as fact that Brewster had a "diagnosis of schizophrenic disorder" (Brief in Oppo. of Hospital, pp. 3-4): impossible, explained in his

petition (pp. 7-8, and n. 3).[4]

These allegations are false, misleading, inflammatory, unsubstantiated, or impossible. They are scandalous and should be disregarded and striken by the Court, in accord with its Rule 34.6.

D. Argument: A detention order is prima facie evidence of state action.

1. Complaint alleges ample facts of state action and has the detention order attached.

The hospital argues it did not act under color of law and that Brewster did not "allege sufficient facts" in his complaint (Brief in Oppo. of Hospital, p. 7). Brewster alleged ample facts in detail in the complaint (App. 1-16; petition, pp. 1-11): perhaps most succinctly illustrated in the complaint by paragraph 8, "acts ... were done ...

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4. This Court has recognized the fallibility of medical and psychiatric diagnosis. See O'Connor v. Donaldson, 422 U.S. 563, 584 (1975).

under the color ... of the statutes ... of Virginia" (App. 6; and Brief in Oppo. of Hospital, p. 7); and paragraph 32 "The alleged detention order is attached as plaintiff Exhibit One" (App. 11).

A detention order is prima facie evidence of state action, or color of law, whether the order is valid or invalid. See petition (pp. 26-29).

2. Brewster was detained and treated as part of a civil commitment procedure and was not simply evaluated.

The hospital argues "Brewster was not the subject of a commitment proceeding" (Brief in Oppo. of Hospital, p. 10), consequently cases he cites do not apply (id.), and "this case thus becomes one of claimed medical malpractice" (id., p. 15).

Brewster replies Virginia Code Sections 37.1-67.1 and 37.1-67.3 are part of Virginia Code Section 37.1 on civil commitment[5], he was subjected to detention

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5. Virginia Code Section 37.1-64(2) cites

and treatment under the statute, and he had a commitment hearing. So cases apply.

Brewster is a victim of both civil rights violations and malpractice.[6] The mere fact that respondents "gave Mr. Brewster drugs which he did not want" (Brief in Oppo. of Hospital, p. 14) violates his civil rights (regardless of malpractice). See petition (pp. 18-20) on forced drugging.

The hospital's argument that "the purpose for which he was there was not custodial, but rather so that the physicians and hospital staff could exercise their independent medical judgment" (Brief in Oppo. of Hospital, p. 12) contradicts the facts or common sense: (1) detention is custodial, as is civil commitment, (2) Dr. Cooper (see petition, pp. 9, 33) is

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"Involuntary admission by the procedure described in Sections 37.1-67.1 through 37.1-67.4."

6. The medical malpractice issue is not before this Court.

the alleged independent medical judge, not the hospital, (3) respondents could not use independent medical judgment in evaluating Brewster, because the hospital (especially Fortescue) was responsible for obtaining the detention order to begin with, i.e., the detention order cites the advice of Fortescue (App. 14), (4) if respondents used independent medical judgment, they would function like Dr. Cooper and play no role in detaining or treating Brewster, and receive no financial gain from his detention or treatment, and (5) a psychiatric evaluation can be conducted in an office, without involuntarily detaining and treating in a hospital (especially for three days).[7] For further lack of independence, see infra, pp. 16-17.

3. No relevant opposition to detention order as prima facie evidence of state action.

Most opposition was addressed in the

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7. Dr. Cooper conducted his "evaluation" for

petition. E.g., Brewster distinguished the Fourth Circuit cases from his case. See petition (pp. 31-35). There is no relevant opposition to Brewster's arguments.[8]

Opposition to Robb v. City of Philadelphia, 733 F.2d 286 (3d Cir. 1984) because "medical judgment by private physicians are not the exclusive prerogative of the state" (Brief in Oppo. of Hospital, p. 16) overlooks that Robb is an example of state action on the part of private citizens acting in concert with city officials (petition, p. 23). Involuntary detention is a state function, and the hospital acted in concert with the state when the state (the magistrate and Moore)

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approximately 30 seconds. Dr. Robertson conducted his without even interviewing Brewster. "Evaluation" even was conducted simply over the phone by the magistrate when he issued an oral order.

8. The hospital always placed great emphasis on government funding (Brief in Oppo. of Hospital, p. 17), not Brewster (App. 94-95, 119).

substituted the judgment of a private party (Fortescue) for their own, i.e., that Brewster should be detained and treated as part of the civil commitment process.

Opposition to Morrison v. Washington County, Ala., 700 F.2d 678 (11th Cir. 1983) because Brewster "did not claim that the drugs were given for any non-medical reason" (Brief in Oppo. of Hospital, p. 14) is not relevant to precluding summary judgment because of a material fact issue. See petition (pp. 28-29).

The hospital opposes Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1986) because the hospital in Malak is publicly owned and the employees "therefore were held to be state actors" (Brief in Oppo. of Hospital, p. 15). Respondents overlooked the "private group" (Associated Physicians, Inc.) who were not employees of the hospital. See Malak, at 278.

Respondents argue that the Court should consider the "chilling effect": that "Holding them liable for such claims will discourage health care providers from providing such services" (Brief in Oppo. of Hospital, p. 17, n. 7). Brewster replies that holding them liable will discourage them from violating the civil rights of innocent persons.

II

REPLY TO BRIEF IN OPPOSITION OF POLICE

A. Scandalous material should be disregarded and striken.

See supra, pp. 5-6, for objections to alleged facts of "indecent exposure charge", "stated he was very depressed and threatened to harm himself" and "diagnosis of schizophrenic disorder" (Brief in Oppo. of Police, pp. 6-7, 11-12, 17).[9] Nor are such alle-

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9. The reference to "two magistrates" (Brief in Oppo. of Police, p. 3) is false and misleading. These are not the two magistrates (Gardner and Hetzer) discussed in the petition (pp. 1-3). Hetzer and Aunon (a magistrate and special justice)

gations any basis for an attempt at civil commitment. See petition (pp. 15-17).

B. Argument: Police are responsible.-

1. Police should have known they violated constitutional rights.

Police argue "A reasonable officer would not believe that temporarily detaining a suicidal[10] individual for a mental evaluation under these circumstances would violate his constitutional rights"(Brief in Oppo. of Police, p. 12). Brewster showed in detail how police should have known. See petition, pp. 35-42).[11]

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were parties below, because the detention order was signed, "David A. Hetzer per José Aunon" (App. 14). What this means never was determined.

10. Brewster was not suicidal and this accusation was not substantiated. Fortescue rated him very low as suicidal (App. 57); if he were a suicidal emergency, he would not have been interviewed for over three hours before a written detention order was issued (App. 15, 54). (And if Magistrate Gardner alleged suicide by phone, he had no authority to issue an oral order without proper advice; nor could Magistrate Hetzer issue a written order without proper advice, according to statute.)

11. Police should have known of the well perceived right to an attorney when detained.

Note that the recent case in this Court (Brief in Oppo. of Police, p. 10) was remanded:

> Thus, on remand, it should first be determined whether the actions (alleged) are actions that a reasonable officer could have believed lawful. Anderson v. Creighton, No. 85-1520, slip opinion (1987), at 11, n. 6 (Scalia, J.).

Also note, "subjective beliefs ... are irrelevant." Id., at 6 (Scalia, J.).

Brewster cited ample authority in his petition (pp. 11-22) that civil commitment is unconstitutional but agrees this Court never may have ruled so (Brief in Oppo. of Police, pp. 11-12, n. 5), which strengthens the reason this Court should grant the petition, as the matter is of importance. See petition (pp. 45-48).

Because Brewster is arguing constitutional violations, Davis v. Scheuer, 468 U.S. 183, 194 (1984) (Brief in Oppo. of Police, p. 15) is not relevant (immunity not lost simply because state

statutes are violated).[12]

In District Court, Brewster distinguished McKinney v. George, 726 F.2d 1183 (7th Cir. 1984) (Brief in Oppo. of Police, p. 13): "no knife, no ... screaming, no emergency at any time" (App. 145).

Harris v. Pirch, 677 F.2d 681 (8th Cir. 1982) (Brief in Oppo. of Police, p. 13) does not apply because in Harris (1) there was no detention order or petition for commitment (no causal connection) and (2) no allegation of an unconstitutional statute. Harris, supra, at 685.

2. Judgment not allowed when genuine issue of any material fact.

Police cite Rule 56(e) of Federal Rules of Civil Procedure (Brief in Oppo. of Police, p. 16) but overlook Rule 56(c), which states that summary judgment should

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12. Even if they follow state statute, they violate constitutional rights. See petition (pp. 11-22).

be entered only when pleadings, depositions, affidavits, and admissions filed show no genuine issue as to any material fact. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). Fountain v. Filson, 366 U.S. 681 (1949).

Brewster filed ample affidavits showing genuine issues: e.g., the detention order with form attached showing Moore as petitioner. Police affidavits were conflicting (App. 142). For disputes of other material facts, see petition (pp. 23-24).

3. Causal link between petition for commitment and ensuing detention and treatment.

Police argue "the health care providers independently decided to subject Brewster to a course of medication and treatment" (Brief in Oppo. of Police, p. 18).

The hospital could not independently detain and treat Brewster if the police

did not bring him there (under false pretenses), prevent him from leaving, and participate in obtaining a written detention order authorizing detention and treatment. Nor was it an independent evaluation with the police communicating to the hospital a false and unsubstantiated accusation of threatening to harm himself, and inflammatory details[13] about a criminal accusation.[14] For other discussion of lack of independence, see infra, pp. 8-9.

There is a causal link between Moore's petition for commitment and the ensuing detention and treatment. Moore should have known he lacked probable cause to petition for commitment. See petition (pp. 38-43).

Also, Moore knew Fortescue recommended drugs despite Brewster's objections, as Moore was present during the interrogation;

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13. Details which Moore said he could not tell Brewster (and which Brewster did not even know at the time).

14. Brewster told them he did nothing wrong and that the charge was mistaken identity.

and the detention order, which he executed (App. 15), referred to Fortescue's report:

> Recommended detention. ... Needs stabilization on medication and eventually a consistent therapeutic contact to monitor his compliance with treatment (App. 54).

Moore participated in locking Brewster in solitary confinement (a form of treatment) without warning or hearing (App. 62, 68). This is not good faith nor a break in the causal chain.[15]

Martinez v. California, 444 U.S. 277 (1980) (Brief in Oppo. of Police, p. 19) does not apply (parolee killed innocent bystander some five months after he was released so death was too remote). In Brewster's case the causal connection between the police and the detention (and damages) was immediate.

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15. Police distinguish good faith from proximate cause (Brief in Oppo. of Police, p. 5, n. 2). The two are inseparable as far as actions of the police are concerned. Brewster's arguments in the Fourth Circuit, as in this Court, of police responsibility apply to good faith immunity as well.

III

CONCLUSION

The importance and substantiality of the questions presented in the petition have not been denied. Brewster raises significant issues justifying the grant of certiorari.

In light of the inability of the respondents to face the issues presented in the petition without resorting to irrelevant cases or issues, the need for plenary review of the action below is indisputable. Indeed, petitioner suggests summary reversal is now in order and suggests the case be remanded to District Court for trial.

Respectfully submitted,

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